Petitioner spent seven years in the Army Reserves, in the 360th Heavy Transportation Battalion. AR390. He was honorably discharged from the Army Reserves in August 1987. AR431. Petitioner is married and has three children, all of whom are United States citizens.

In 1990, the Immigration and Naturalization Service ("INS") initiated deportation proceedings against Petitioner based on convictions in California for petty theft in 1988 and second-degree burglary in 1989. AR459. In February 1991, however, an immigration judge closed the deportation proceedings, issuing an order stating that "Respondent is *prima facie* eligible for U.S. citizenship pursuant to section 329 of the Act." AR455. Section 329 of the INA is codified at 8 U.S.C. § 1440, and allows honorably discharged active-duty veterans of the Vietnam War and other periods of military hostilities to be naturalized "regardless of age, and notwithstanding the provisions of section 1429 of this title as they relate to deportability. . . ." 8 U.S.C. § 1440(b)(1).[1]

In August 1995, Petitioner filed an Application for Naturalization, Form N-400. AR371. This application was "initially approved" according to records of the Department of Homeland Security, Bureau of Citizenship and Immigration Services ("CIS"). *Id.* On March 11, 2000, however, the CIS reversed this initial approval of Petitioner's Application. *Id.*

---

1. President Carter declared in Executive Order No. 12081 that, for purposes of Section 329 of the INA (8 U.S.C. § 1440), Vietnam hostilities terminated on October 15, 1978. Because Petitioner was honorably discharged from active-duty service during the Vietnam hostilities, he was eligible for naturalization pursuant to Section 1440.

On September 7, 2000, an immigration judge issued an order terminating deportation proceedings against Petitioner. AR440, 442. The basis for the termination was given as 8 C.F.R. Part 239.2(f), which at that time stated, in pertinent part:

> An immigration judge may terminate removal proceedings to permit the alien to proceed to final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors. . . .

Despite this September 2000 order appearing to permit Petitioner's Application for Naturalization to be adjudicated, new removal proceedings were initiated against Petitioner on March 20, 2003. AR456. On April 7, 2003, the CIS issued a decision rejecting Petitioner's Application for Naturalization, without substantial explanation as to the reason for the eight-year delay between the date of the Application and the date of decision. AR370-71.

On May 22, 2003, Petitioner was ordered to be removed and deported to Colombia based on (1) a November 2001 conviction in California for possession of methamphetamine, which the immigration judge in this case termed an "aggravated felony" pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii); and (2) his convictions in California for petty theft in 1988 and second-degree burglary in 1989. AR42, 54, 457, 460. The immigration judge denied Petitioner's application for asylum and for withholding of removal to Colombia under the Convention Against Torture. AR053-054.

In his removal proceedings, Petitioner argued that he is not subject to deportation under Section 1227(a)(2)(A) because he is a national of the United States, and not an alien, pursuant to the language of 8 U.S.C. § 1101(a)(22)(B). Section 1101(a)(22)(B) states that a national is a person who, though not a citizen of the United States, owes permanent allegiance to the United States. In his decision ordering that Petitioner be removed, the immigration judge rejected this argument:

> At a prior hearing of this Court the respondent entered pleadings in his case. He denied allegation one that he was not a citizen or national of the United States. He admitted factual allegation two on the Order to Show Cause, factual allegation three on the Order to Show Cause as well as allegations four, five and six on the Order to Show Cause. A denial of the charge of removability on the OSC as well as the I-261 was entered based upon the respondent's denial to factual allegation one. Specifically, the respondent claimed that he was a citizen or national of the United States.
>
> The respondent did testify and has testified regarding his applying for citizenship but did not receive citizenship. The respondent alleges that his lengthy honorable service in the United States military entitles him to status as a national in the United States. However, the Board of Immigration Appeals in a 29 April 2003 decision *Navas-Acosta*, Int. Dec. 3489, the Board of Immigration held that United States nationality cannot be acquired by taking an oath of allegiance pursuant to an application for naturalization

> because birth and naturalization are the only means of acquiring United States nationality under the Immigration and Nationality Act. Based upon the testimony and other evidence in the case, the testimony of respondent and the *Matter of Navas-Acosta*, this Court found the factual allegation that the respondent was not a citizen or national of the United States. It also denied the respondent's Motion to Terminate because the respondent was not a citizen or national of the United States. [App., *infra*, at 11a].

On September 10, 2003, the BIA affirmed the immigration judge's decision without opinion. AR002. On September 23, 2003, Petitioner filed a Petition for Review in the United States Court of Appeals for the Ninth Circuit. In opposing the Petition, the Respondent argued that Petitioner is an alien, not a national of the United States. Respondent argued that Petitioner was foreclosed by direct Ninth Circuit authority from claiming to be a national of the United States.

On May 23, 2005, the Ninth Circuit denied the Petition. On August 9, 2005, the Ninth Circuit rejected Petitioner's Petition for Rehearing and Rehearing *En Banc* of Order Denying Petition for Review.

REASONS FOR GRANTING THE PETITION

I. The Circuit Courts Are Split On Whether A Person May Become A National Of The United States Other Than Through Birth Or Naturalization

The current law regarding whether a person may become a national of the United States other than through birth or naturalization is subject to conflicting decisions of the Fourth Circuit Court of Appeals and the Ninth Circuit Court of Appeals. The Fourth Circuit in *United States v. Morin*, 80 F.3d 124, 126 (4th Cir. 1996), affirmed a decision of the District Court that a lawful permanent resident of the United States who had applied for United States citizenship is a "national of the United States" pursuant to 8 U.S.C. § 1101(a)(22). The Ninth Circuit, however, has explicitly rejected the Fourth Circuit's holding in *Morin*, stating in *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 972 (9th Cir. 2003), *cert. denied*, 540 U.S. 1104, 124 S. Ct. 1041, 157 L. Ed. 2d 887 (2004), that "a person can become a 'national of the United States' only through birth or naturalization." In *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 939-40 (9th Cir. 2004), the Ninth Circuit applied its holding in *Perdomo-Padilla* in rejecting the argument that persons who have served in the United States military should be deemed nationals of the United States. This direct conflict between the decisions of the Fourth Circuit and the Ninth Circuit has not been resolved by published decisions of either court.

A. The Fourth Circuit's Interpretation of 8 U.S.C. § 1101(a)(22) in *United States v. Morin*

In *Morin*, the Fourth Circuit considered whether to affirm conviction of the defendant for murder-for-hire, 18 U.S.C. § 1958(a). 80 F.3d at 125. In its decision, the Fourth Circuit noted that "the murder of 'a national of the United States, while such national is outside the United States' is a federal offense punishable 'by death or imprisonment for any term of years or for life.'" *Id.* at 126 (citing 18 U.S.C. § 2332(a)). The defendant argued, however, that the intended victim of the alleged murder-for-hire plot was not a national of the United States, but rather, a Mexican citizen. *Id.* The Fourth Circuit rejected this argument:

> Citizenship, however, is not the sine qua non of "nationality." A "national of the United States" may also be "a person who, through not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22). The district court found that because Dr. Soto was a permanent resident alien of the United States who had applied for United States citizenship, he was indeed "a national of the United States." *We agree – an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself.* Accordingly, had Morin succeeded in killing Dr. Soto, the murder would have violated § 2332(a). [*Id.* at 126-27 (emphasis added)].

Applying the Fourth Circuit's reasoning in *Morin*, the District Court in *Lee v. Ashcroft*, 216 F. Supp. 2d 51 (E.D.N.Y. 2002), determined that a lawful permanent resident subject

to an order of removal had demonstrated allegiance to the United States, and was thus a national. The petitioner in *Lee* had been born in Hong Kong and entered the United States in 1973 as a child. *Id.* at 53. The *Lee* petitioner registered for Selective Service in 1980, and filed an application for citizenship in July 1998. In December 1998, the petitioner was indicted on four counts of mail fraud, and was later convicted of conspiracy to commit mail fraud and mail fraud.

The INS charged the petitioner in *Lee* with removability from the United States as an aggravated felon, pursuant to Sections 237(a)(2)(A)(III), 101(a)(43)(M)(i) and 101(a)(32)(U) of the INA. The petitioner subsequently filed a petition contending that he cannot be deported under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), which mandates the deportation of "any alien who is convicted of an aggravated felony." The petitioner argued that he is a national of the United States, not an "alien" subject to deportation.

The District Court in *Lee* noted that the term "national" came into general use when the United States acquired territories outside its continental limits and accorded inhabitants with a status that was not equivalent to citizenship, but that nonetheless conferred certain rights and responsibilities as nationals of the United States. 216 F. Supp. 2d at 57 (citing *Oliver v. United States Dep't of Justice*, 517 F.2d 426, 428 n.3 (2d Cir. 1975)). Such nationals were deemed to owe allegiance to the United States. *Id.*

The District Court in *Lee* reviewed the extant case law regarding modern application of the term "national," and stated that "[a]t a minimum, it appears that to qualify as a national, an individual must have demonstrated his or her

allegiance by applying for citizenship." *Id.* (citing *Hughes v. Ashcroft*, 255 F.3d 752, 756 (9th Cir. 2001)[2], *Oliver*, 517 F.2d at 428, and *Morin*, 80 F.3d at 126). The District Court also relied on a decision of this Court in its analysis, quoting language from *Johnson v. Eisentrager*, 339 U.S. 763, 770, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), for the proposition that "[t]he Supreme Court has also identified the application for citizenship as a step in the process of acquiring the full rights of citizenship" (*Lee*, 216 F. Supp. 2d at 58):

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. [*Johnson*, 339 U.S. at 770].

Relying on the decisions in *Morin*, *Hughes*, *Oliver* and *Johnson*, the District Court in *Lee* held that the petitioner had objectively demonstrated his allegiance to the United States:

> . . . Lee has been a permanent resident for nearly 30 years. He entered the United States as a child, and

---

2. In *Hughes*, the Ninth Circuit stated that:

> it appears that, in order for a person who is born outside the United States to qualify for "national" status, the person must, at a minimum, demonstrate (1) birth in a United States territory or (2) an application for United States citizenship. [255 F.3d at 757].

> has never lived anywhere else since. He is married to a United States citizen and has two citizen children. Both of his parents are naturalized citizens. All of his ties are to the United States. He has no ties to Hong Kong, a territory that is now under a different political authority than it was during the brief period of his residency there. Furthermore, Petitioner has objectively demonstrated his allegiance to the United States. Prior to his arrest and indictment in his only criminal case, Petitioner filed his application for citizenship on July 13, 1998, thereby expressing his willingness to take an oath of allegiance to his adopted country. In addition, his registration for Selective Service on September 9, 1980 further indicates his loyalty to the United States. [*Lee*, 216 F. Supp. 2d at 58].

Based on these facts, the District Court in *Lee* held that the petitioner could not be deported as a criminal alien under INA Section 237(a)(2)(A)(iii):

> . . . Petitioner has satisfied the requirements to be considered a national of the United States. He has demonstrated his allegiance through his application for naturalization and his registration for Selective Service. As a national, he is not subject to deportation on the basis of his conviction for mail fraud. [*Id.* at 58-59].

B. The Ninth Circuit's Interpretation of 8 U.S.C. § 1101(a)(22)

In direct conflict with the Fourth Circuit's opinion in *Morin*, and the logical application of the *Morin* decision by the District Court in *Lee*, the Ninth Circuit in *Perdomo-Padilla* held that a person can become a "national of the United States" under the INA only through birth or naturalization. *Perdomo-Padilla*, 333 F.3d at 972. The Ninth Circuit rejected the argument that a permanent resident who completed an application for naturalization was a national of the United States. The Ninth Circuit held that the term "national," when used to describe non-citizens, refers only to those born in territories of the United States. *Id.* at 968. Because the petitioner was a citizen of Mexico, and had not been born in territories of the United States, the Ninth Circuit held that he was not a "national," and was subject to removal pursuant to the INA. *Id.* at 965.

In its analysis in *Perdomo-Padilla*, the Ninth Circuit reviewed the text of Section 1101(a)(22)(B), with its definition of "national" as a person who "owes *permanent* allegiance to the United States." *Id.* at 968 (emphasis in original). The Ninth Circuit declared that "[a] naturalization applicant cannot rightly be said to owe *permanent* allegiance, because naturalization applications are often denied or withdrawn." *Id.* (emphasis in original). It further stated that under the petitioner's argument, rejected applicants for naturalization who do not renounce their statements of allegiance could remain nationals of the United States. *Id.* at 969. The Ninth Circuit panel declared that Congress "did not intend this odd construction of the statute." *Id.*

The Ninth Circuit in *Perdomo-Padilla* also reviewed what it considered to be the "context" of Section 1101(a)(22)(B), finding support for its interpretation of "national of the United States" in 8 U.S.C. § 1408, a statute which it said supports the conclusion that status as a national relates to birth in an outlying possession of the United States. *Id.* Additionally, the Ninth Circuit cited as support certain language in 8 U.S.C. § 1429, which provides that "no person shall be naturalized against whom there is outstanding a final finding of deportability . . . and no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding." *Id.* at 970. The Ninth Circuit concluded from this language that Congress viewed applicants for naturalization as aliens and not as nationals. *Id.*

In reaching its holding, the Ninth Circuit rejected the petitioner's argument that its prior decision in *Hughes* supported his interpretation of Section 1101(a)(22). *Id.* at 971. It stated that the court in *Hughes* had "expressly declined to decide whether an application for naturalization, standing alone, is sufficient to confer nationality on an alien." *Id.*

Finally, the Ninth Circuit in *Perdomo-Padilla* explicitly rejected the holding in *Morin* that an application for citizenship demonstrates permanent allegiance to the United States. *Id.* at 972. The Ninth Circuit stated that "*Morin* is directly on point because, although the question of how to define the term 'national' arose in a criminal case instead of in a removal proceeding, the Fourth Circuit defined the term for purposes of 8 U.S.C. § 1101(a)(22), the same statute at issue here." *Id.* But the Ninth Circuit found the *Morin* decision to be unpersuasive. *Id.*

Based on the above reasoning, the Ninth Circuit in *Perdomo-Padilla* held that "a person can become a 'national of the United States' under the INA only through birth or naturalization." *Id.* It held, therefore, that the petitioner did not change his status from that of an alien to that of a national by filing an application for naturalization. *Id.*

In *Reyes-Alcaraz*, the Ninth Circuit applied the holding in *Perdomo-Padilla* to reject the petitioner's claim that by signing the United States military oath and serving in the U.S. Army he had become a United States national. *Reyes-Alcaraz*, 363 F.3d at 940. The court stated that even if it were free to decide that the petitioner could achieve national status by some act other than full naturalization, "we would conclude that the military oath does not demonstrate the signer 'owes *permanent* allegiance to the United States.'" *Id.* (citing 8 U.S.C. § 1101(a)(22)).

At least two other Circuit Courts have issued opinions in conflict with the Fourth Circuit's holding in *Morin*. In *Salim v. Ashcroft*, 350 F.3d 307 (3d Cir. 2003), the Third Circuit held that a Bangledeshi citizen who was convicted of an aggravated felony before he completed the process of applying for naturalization was not a national of the United States. In *Marquez-Almanzar v. INS*, 418 F.3d 210, 219 (2d Cir. 2005), the Second Circuit explicitly rejected the reasoning of *Morin*, holding that a native of the Dominican Republic who had served in the United States Army was not a national of the United States.

II. This Court Should Reconcile The Conflicting Decisions Of The Circuit Courts Regarding The Statutory Requirements To Become A National Of The United States

A. This Court Should Grant Review To Resolve Inconsistent Statutory Interpretations of United States Nationality

The conflict between the Fourth Circuit's decision in *Morin*, and the decisions of the Ninth Circuit and other Circuit Courts, relates to a fundamental question of statutory interpretation of great importance to federal immigration law. As a result of the conflicting opinions of the Circuit Courts, it is unresolved whether a non-citizen who was not born in a territory of the United States may become a United States national by demonstrating permanent allegiance to the United States. The Court should grant this Petition in order to give clear guidance to the federal courts as to the proper interpretation of the INA with regard to United States nationals.

The plain language of 8 U.S.C. § 1101(a)(22) is that a "national of the United States" includes "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." The reasoning of the Ninth Circuit in *Perdomo-Padilla* and *Reyes-Alcaraz* renders this statutory language superfluous, however, because those decisions cite to Section 1101(a)(22) to support the statement that a person can become a national "only through birth or naturalization." *Perdomo-Padilla*, 333 F.3d at 972; *Reyes-Alcaraz*, 363 F.3d at 939. But Section 1101(a)(22)(B) clearly does not require that a person be naturalized in order to attain status as a national, because it specifically states that a non-

citizen may be a national if he or she owes permanent allegiance to the United States. Nor does Section 1101(a)(22) state that a national must be born in a United States territory in order to claim permanent allegiance to the United States. 8 U.S.C. § 1101(a)(22).

The Ninth Circuit's interpretation of Section 1101(a)(22) is particularly notable because it relates to the very definition of "national of the United States" as that term is used in the INA. Rather than interpret the statute to give meaning to the phrase "though not a citizen of the United States, owes permanent allegiance to the United States," the Ninth Circuit in *Perdomo-Padilla* and *Reyes-Alcaraz* has essentially given this statutory language no legal meaning or effect. Thus, in *Perdomo-Padilla*, the Ninth Circuit held that an applicant for citizenship "does not owe permanent allegiance to the United States until the applicant takes the full oath of allegiance as part of a naturalization ceremony." 333 F.3d at 969 n.4. In other words, the Ninth Circuit's interpretation of Section 1101(a)(22) requires that the person become a *citizen* in order to demonstrate permanent allegiance to the United States, a requirement specifically disclaimed by the plain meaning of the statute itself.

Therefore, the Ninth Circuit's interpretation of Section 1101(a)(22) essentially reads out of the INA the phrase "though not a citizen of the United States." In *Duncan v. Walker*, 533 U.S. 167, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001), this Court explained why such statutory interpretation is improper:

> Respondent's contrary construction would render the word "State" insignificant, if not wholly superfluous. This Court's duty to give effect,

> where possible, to every word of a statute, *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 99 L. Ed. 615, makes the Court reluctant to treat statutory terms as surplusage. This is especially so when the term occupies so pivotal a place in the statutory scheme as the word "State" in the federal habeas statute. *Id.* at 167-68.

Previously, this Court has granted certiorari where the Circuit Courts disagreed on the proper application of the federal habeas corpus statute, "[b]ecause uniformity among the federal courts is important on questions of this order. . . ." *Thompson v. Keohane*, 516 U.S. 99, 106, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). The definition of United States national, and the ability of lawful permanent residences to become nationals, certainly raises questions of at least equal importance to the questions that the Court addressed in *Thompson*. Moreover, there is great need for national uniformity in the interpretation and application of immigration law. *See Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) ("In the immigration context . . . the need for national uniformity is paramount, as the '[p]ower to regulate immigration is unquestionably exclusively a federal power.'") (quoting *DeCanas v. Bica*, 424 U.S. 351, 354, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976)).

B. The Issue Raised by This Petition Has Great Significance to Federal Immigration Law

The issues raised by this Petition also require this Court's resolution because of the great number of individuals detrimentally impacted by inconsistency in the interpretation of the 8 U.S.C. § 1101(a)(22). The Department of Homeland Security reports that more than 946,000 people became lawful

permanent residents of the United States in Fiscal Year 2004 alone. Each of these lawful permanent residents who are male and within the age classification for the Selective Service Act are required to register for the draft. *See* 50 App. U.S.C.A. § 453 (2005) ("[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, . . . to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."). Moreover, lawful permanent residents are eligible to serve voluntarily in the United States military.

Petitioner submits that the ability of lawful permanent residents to demonstrate permanent allegiance to the United States through military service is a question of great importance requiring this Court's attention. This Court observed more than fifty years ago that "[m]ere lawful presence in the country creates an implied assurance of safe conduct and gives [the alien] certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization." *Johnson*, 339 U.S. at 770. One commentator recently echoed the Court's statement in *Johnson* that "[t]he alien . . . has been accorded a generous and ascending scale of rights as he increases his identity within our society" (*id.*):

> Nonetheless, the complex relationships between political participation, citizenship, and membership in the political community do suggest that, whether viewed from the perspective of legal practice or social reality, it is inaccurate to understand membership in the national political community as

> defined solely by the legal status of citizenship. Instead, membership may take different forms or degrees, with citizenship at the center but others also included within the ambit of the political community. The daily lives of long-term residents in the United States comport with this conclusion and further confirm that resident aliens are members of the national political community. Their everyday existence is nearly indistinguishable from that of citizens. They work, pay taxes, and raise families in the same way that citizens do. And their obligations to the community are far greater than the fiscal ones imposed by tax obligations: resident aliens are, for example, subject to the draft. [Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 Cal. L. Rev. 373, 407 (2004)].

Given that lawful permanent residents have significant obligations to society, the rights accorded to them by Congress should be given uniform interpretation and application in the federal courts. Petitioner submits that the Court should grant this Petition in order to resolve the status of the many lawful permanent residents in this country who have demonstrated permanent allegiance to the United States, but have not been naturalized and were not born in territories of the United States. *See Patterson v. Lamb*, 329 U.S. 539, 67 S. Ct. 448, 91 L. Ed. 485 (1947) (granting certiorari to resolve issues regarding status and claims of thousands of draftees of World War I affected by decision below).

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted.

Respectfully submitted,

PETER C. MEIER
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
(415) 856-7000

Attorneys for Petitioner

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 23, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-73411

Agency No. A14-333-279

MEMORANDUM*

JORGE FAJARDO HERNANDEZ,

Petitioner,

v.

ALBERTO R. GONZALES,**
Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

Appendix A

Argued and Submitted May 9, 2005
San Francisco, California

Before: KLEINFELD, HAWKINS, and GRABER, Circuit Judges.

Petitioner Jorge Fajardo Hernandez timely appeals the Board of Immigration Appeals' summary affirmance of an immigration judge's order of removal and deportation.

1. Most of the issues that Petitioner argues to this court are argued for the first time on appeal. But we lack jurisdiction to consider any claim not raised before the Board of Immigration Appeals. *Zara v. Ashcroft*, 383 F.3d 927, 930-31 (9th Cir.2004).

2. Petitioner claims here, as he did below, that he was denied a full and fair hearing. We have reviewed the record and find no violation of Petitioner's right to due process. He had sufficient notice of the asserted grounds for deportation, and the immigration judge sufficiently assisted this pro se litigant.

3. Petitioner also claims here, as he did below, that he was entitled to relief under the Convention Against Torture and relief in the form of withholding of removal. On the merits of this claim, we are not persuaded that the agency erred in finding that Petitioner failed to prove that it is more likely than not that he would be tortured or persecuted if returned to Colombia. *See Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001) (describing standard).

PETITION DENIED.

APPENDIX B — ORDER OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED SEPTEMBER 10, 2003

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A14-333-279 - ELOY

In re: FAJARDO-HERNANDEZ, JORGE ERNESTO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Patricia M. Vroom, Chief Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

s/ [illegible]
FOR THE BOARD

APPENDIX C — ORDER OF THE IMMIGRATION JUDGE DATED MAY 22, 2003

IMMIGRATION COURT
1705 E. HANNA RD.
ELOY, AZ 85231

Case No.: A14-333-279

IN REMOVAL PROCEEDINGS

In the Matter of

FAJARDO-HERNANDEZ, JORGE ERNESTO

Respondent

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on *May 22, 2003*. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to *Colombia*.

* * *

[X] Respondent's application for asylum was *denied*.

[X] Respondent's application for withholding of removal was *denied*.

* * *

Appendix C

[X] Other: *Withholding & deferral under Convention Against Torture denied.*

Date: May 22, 2003

Appeal: *Reserved*

Appeal Due By: *Respondent 23 June 2003*

s/ John W. Davis
JOHN W. DAVIS
Immigration Judge

APPENDIX D — AMENDED DEPORTATION ORDER DATED MAY 22, 2003

AMENDED DEPORTATION ORDER

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1705 E. HANNA RD.
ELOY, AZ 85231

Case No.: A14-333-279

IN DEPORTATION PROCEEDINGS

In the Matter of

FAJARDO-HERNANDEZ, JORGE ERNESTO

RESPONDENT

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on *May 22, 2003*. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decison in this matter.

[X] The respondent was ordered deported to *Colombia*.

* * *

[X] Respondent's application for asylum was *denied*.

Appendix D

[X] Respondent's application for withholding of deportation was *denied.*

* * *

[X] Other: *Withholding & deferral under Convention Against Torture denied.*

* * *

/s/ John W. Davis
JOHN W. DAVIS
Immigration Judge

Appeal: RESERVED (*Alien*)

Appeal Due By: *23 June 2003*

APPENDIX E — ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT, ELOY, ARIZONA DATED MAY 22, 2003

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
ELOY, ARIZONA

File No.: A 14 333 279 May 22, 2003

IN DEPORTATION PROCEEDINGS

In the Matter of

JORGE ERNESTO FAJARDO-HERNANDEZ,

Respondent

CHARGES: Section 241(a)(4) of the Act — anytime after admission two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, those two offenses being theft with a prior and burglary;

Section 241(a)(2)(A)(iii) of the Act — anytime after admission conviction of an aggravated felony as defined in Section 101(a)(43)(B) of the Immigration and Nationality Act.

Appendix E

APPLICATIONS: Motion to Terminate; asylum; withholding of removal under the Act; withholding of removal and deferral of removal under the Convention Against Torture.

ON BEHALF OF RESPONDENT:

Pro se

ON BEHALF OF DEPARTMENT:

Theresa M. Riley, Esquire
Assistant District Counsel
1705 East Anna Road
Eloy, Arizona

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a 47-year-old married male, native and citizen of Colombia. The United States Immigration and Naturalization Service (now the Department of Homeland Security) has brought these removal proceedings against the respondent. Proceedings were commenced with the filing with the Immigration Court of an Order to Show Cause on the 23rd of January 1991. It is Exhibit 1 in these proceedings.

That document charged that the respondent was not a citizen or national of the United States. That he was a native of Colombia and a citizen of Colombia. It further alleged that he entered the United States at New York City, New York around the 15th of November 1965 and that he was then admitted as an immigrant and alleged a conviction on May 18th, 1988, Superior Court of California, Los Angeles County for theft with a prior in violation of Section 666 of

the California Penal Code. It alleged a further conviction on March 23rd, 1989, Superior Court of California, Los Angeles County, for burglary in the second degree. Based on those factual allegations, the Order to Show Cause alleged that the respondent was deportable under Section 241(a)(4) of the Act, that at anytime after entry having been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct alleging that the theft with a prior and the burglary were the two offenses.

The respondent was placed in proceedings in Los Angeles, California, and his case on the 21st of February 1991 was administratively closed by an Immigration Judge in order for the respondent to apply for naturalization. The respondent subsequently applied for naturalization but never received naturalization. He subsequently engaged in further criminal conduct resulting in criminal convictions, was again placed in proceedings, and these proceedings were recalendar and venue in this matter was brought to Eloy on the 18th of March 2003.

On the 7th of April an I-261, additional charge of inadmissibility/deportability was served on the respondent in court. It alleged a seventh factual allegation that the respondent was on the 7th of November 2001 convicted in the Superior Court of California in and for the County of Riverside for possession of methamphetamine in violation of Section 11377(a) of the California Health & Safety Code. Based on that factual allegation, the Government alleged an additional charge of removability under Section 241(a)(2)(A)(iii) of the Act, that at anytime after entry convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act, an illicit drug trafficking offense.

Appendix E

At a prior hearing of this Court the respondent entered pleadings in his case. He denied allegation one that he was not a citizen or national of the United States. He admitted factual allegation two on the Order to Show Cause, factual allegation three on the Order to Show Cause as well as allegations four, five and six on the Order to Show Cause. A denial of the charge of removability on the OSC as well as the I-261 was entered based upon the respondent's denial to factual allegation one. Specifically, the respondent claimed that he was a citizen or national of the United States.

The respondent did testify and has testified regarding his applying for citizenship but did not receive citizenship. The respondent alleges that his lengthy honorable service in the United States military entitles him to status as a national in the United States. However, the Board of Immigration Appeals in a 29 April 2003 decision *Navas-Acosta*, Int. Dec. 3489, the Board of Immigration held that United States nationality cannot be acquired by taking an oath of allegiance pursuant to an application for naturalization because birth and naturalization are the only means of acquiring United States nationality under the Immigration and Nationality Act. Based upon the testimony and other evidence in the case, the testimony of respondent and the *Matter of Navas-Acosta*, this Court found the factual allegation that the respondent was not a citizen or national of the United States. It also denied the respondent's Motion to Terminate because the respondent was not a citizen or national of the United States.

Following that finding, the Court sustained the charge of removability under Section 241(a)(4) and subsequently sustained the charge of removability under Section 241(a)(2)(A)(iii) of the Act, anytime after entry conviction

of an aggravated felony as defined in Section 101(a)(43)(B) of the Act.

The respondent expressed fear in returning to Colombia should deportation become necessary. The country of Colombia was directed by the Court and the respondent was provided with an 1-589 application for asylum and withholding of removal. Applications for asylum and withholding of removal under the Act are also treated as applications for withholding of removal and deferral of removal under the Convention Against Torture. The respondent was given time to complete that application and the matter was set over until today for a hearing on that matter.

As previously stated, Exhibit 1 in these proceedings is the Order to Show Cause. Exhibit 1-A is an I-261, additional charge of inadmissibility/deportability dated April 7th, 2003. Exhibit 2 is the denial of the respondent's naturalization application and it is dated the 7th of April 2003. Exhibit 3 is the respondent's application for asylum and withholding. Exhibit 4 is a 2000 Country Report for Colombia. Exhibit 5 are Service documents including the conviction documents with the complaints and an I-213. Exhibit 6 are further submissions by the respondent including information from Amnesty International and activities of paramilitaries in Colombia. Exhibit 7 is the 2002 Country Report on Human Rights Practices in Colombia. In addition to those seven documents, the respondent testified in support of his application.

Appendix E

FACTS

The respondent is 47-year-old, married with children. He came to the United States in 1965 when he was nine years old. He served in the United States military on active duty from 1975 to 1978. He also served for a period of time in the Reserves. He was nine years old when he came to the United States. He came with his mother. Both he and his mother came to the United States as lawful permanent residents. The respondent's mother was married at the time but to a Colombian national, not a U.S. citizen. The respondent testified that he attended school in Colombia and that prior to his departure from Colombia in 1965, he was never hurt by any government officials in Colombia.

The respondent testified that his mother came to the United States to avoid the situation in Colombia. The respondent testified at that time problems from guerrilla groups such as the FARC, NLA and other guerrilla groups who were associated with NARCO trafficking were beginning and that they continue to this date. The FARC and the NLA, the respondent testified, are anti-government groups. The respondent testified that the military, to an extent, is involved in this. The military in Colombia being part of the government and the respondent testified that many general officers and officers have been held accountable for corruption by the Colombian government. The respondent further testified that in his belief there has been on changes in Colombia since 1965. The respondent testifies that he gets information on Colombia weekly from various news sources. He does not know anyone in Colombia. He reads a Mexican newspaper and listens to television reports. The respondent, since his time in the United States, has had no political involvement in anything or any actions related to Colombia.

Appendix E

The respondent, both in his application and in his testimony, states that he is fearful of returning to Colombia because of his lifetime ties to the United States and his ten years of honorable service with the United States Army. He states that his life will be in danger by any of the different anti-USA and Colombia government guerrilla groups citing specifically the FARC or any other groups out there that kill and kidnap and torture people daily. The respondent states that he would be a good target for any of these groups. He states he has no allegiance to Colombia. My life and only home is the USA. I fear because of my allegiance and honorable service to the U.S. military I will be tortured or killed in Colombia.

The respondent further testifies that he believes he would be used as an example by these groups, when that was narrowed down saying that it would be those Colombians who have prior U.S. military service or who could otherwise be viewed as a threat. The respondent also testified that Americans in general are targets when they are in Colombia. He testified further that Colombia is a dangerous place for anyone to live in. The respondent did testify that he had no special military training or military secrets that the FARC or NLA or Colombian government for that matter would want access to. The respondent has worked consistently as a construction worker and roofer in the United States and he has an extensive criminal background. He started with petty thefts in 1985 being placed on probation for that offense and within two months suffering another offense for petty theft. In 1986 he was arrested and convicted for carrying a concealed weapon. In 1987 under the influence of marijuana, placed in diversion as well as petty theft. 1988, petty thefts with priors for which he received two years in jail. 1989, a

second degree burglary for which he received three years in jail. At that point he was placed into deportation proceedings and still the case was administratively closed in order to allow the respondent to apply for naturalization.

The respondent did apply for naturalization filing an N-400 and that request was acted upon by the Department of Homeland Security's Bureau of Citizenship and Immigration Services on the 7th of April 2003. The respondent's application was filed apparently in 1995. The respondent had on the 13th of August 1996 an appointment to appear for an examination on his application for naturalization. He did not appear at that hearing, however, subsequent investigation and examination of the application determined that the respondent is ineligible under Section 316 of the Act because, in pertinent part, it states no person except as otherwise provided in this subchapter shall be naturalized unless such applicant has resided continuously within the United States from the date of the application up to the time of admission to citizenship and during all periods referenced to in this subsection has been and still is a person of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States.

In defining good moral character for naturalization purposes, Title 8 of the C.F.R. Section 131610 states in pertinent part, unless an applicant establishes extenuating circumstances, the applicant shall be found to lack good moral character if during the statutory period the applicant committed unlawful acts that adversely reflect on the applicant's moral character or was convicted or imprisoned for such acts although the acts do not fall within the purview of Section 316.10(b)(1) or (2).

Appendix E

The Service, upon reviewing the application and subsequent activities, determined that the November 7, 2001 conviction in the Superior Court of California, Riverside County for possession of methamphetamine and receiving stolen property in violation of Section 496 of the California Penal Code for which he was sentenced to 16 months and 24 months in prison, respectively. They concluded that each of these offenses constitutes an aggravated felony under the Immigration law which is correct and as an alien convicted of an aggravated felony, you would be permanently ineligible for naturalization because you cannot demonstrate good moral character as a matter of law. Therefore, the Department at that time denied that application.

The respondent in his closing statement once again testified that he believes his long time ties and honorable military service entitle him to status as a national of the United States. He testified that he was willing to give his life for the United States. He is remorseful for his criminal offenses. He testified that he believes he is a petty criminal who does not deserve to be deported. He has not sold drugs. He has testified he has not used violence in the conduct of any of his crimes and feels that he should be allowed to remain in the United States.

THE REQUESTED RELIEF

The respondent is ineligible for asylum inasmuch as he has been convicted of an aggravated felony. The respondent is ineligible for withholding of removal under Section 241(b)(3) of the Act inasmuch as this Court has concluded that he has been convicted of two crimes that are particularly serious, those being the November 7th, 2001 possession of methamphetamine conviction and the receiving stolen

property conviction again in 2001. That is without regard to the respondent's convictions in 1988 and 1989 for which he respectively received two and three years. However, the Court's conclusion that these 2001 aggravated felony convictions are particularly serious renders the respondent ineligible for withholding of removal under Section 241(b)(3) of the Act. Furthermore, it renders the respondent ineligible for withholding of removal to Colombia under the Convention Against Torture. That leaves as the only form of relief available to the respondent deferral of removal under the Convention Against Torture.

We turn now to the respondent's application for deferral of removal. The burden of proof is on the applicant seeking protection under the Torture Convention to establish that it is more likely than not that he would be tortured if removed to the proposed country of removal. In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered including evidence of past torture inflicted on the applicant, evidence that the applicant can locate to a part of the country of removal where he is not likely to be tortured, evidence of gross, flagrant or mass violations of human rights within the country of removal where applicable and other relevant information regarding conditions in the country of removal. *See* 8 C.F.R. Section 208.16(c)(2) and (3).

Torture is defined as any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act that he or a third person has committed or is suspected

of having committed or intimidating or coercing him or a third person or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. *See* 8 C.F.R. 208.18(a)(1).

It is the conclusion of this Court that the respondent has failed to meet his burden showing that it is more likely than not that he would be tortured if removed to Colombia. By his own testimony and clearly by the documentary evidence submitted in this record, Colombia is not a pleasant country. However, there is no evidence to suggest that this respondent would be tortured or persecuted for any reason. Although the respondent, this Court will conclude, testified in a credible manner, his claim that he would be used as an example is not credible and does not carry his burden of showing that more likely than not that he would be tortured if removed to Colombia. Furthermore, by the respondent's own testimony the Colombian government is doing what it can. It is prosecuting, by his testimony, general officers and other military officers who are engaged in corruption.

Therefore, having not met his burden that it is more likely than not that he would be tortured if removed to Colombia, the respondent's application for deferral of removal under the Convention Against Torture will also be denied.

Appendix E

ORDERS

IT IS HEREBY ORDERED that the respondent's application for asylum be and hereby is denied;

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under Section 241(b)(3) of the Act be and hereby is denied;

IT IS FURTHER ORDERED that the respondent's application for withholding of removal to Colombia under the Convention Against Torture be denied;

IT IS FURTHER ORDERED that the respondent's application for deferral to Colombia under the Convention Against Torture be denied;

IT IS ORDERED that the respondent be removed and deported from the United States to Colombia on the charges contained in the Order to Show Cause and the I-261.

s/ John W. Davis
JOHN W. DAVIS
Immigration Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 9, 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-73411

Agency No. A14-333-279

JORGE FAJARDO HERNANDEZ,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

ORDER

Before: KLEINFELD, HAWKINS, and GRABER, Circuit Judges.

The panel has voted to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.